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No. 99-1426

In the Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,

Cross-Petitioners,

v.

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Cross-Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF *AMICI CURIAE* OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF CROSS-PETITIONERS

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QUESTION PRESENTED

Whether the Clean Air Act requires that the Environmental Protection Agency must, in setting nationwide air-quality standards, ignore all factors "other than health effects relating to pollutants in the air," given that consideration of such factors would permit both the Agency and reviewing courts to avoid confronting constitutional nondelegation issues.

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INTEREST OF AMICI CURIAE

The Washington Legal Foundation ("WLF") is a nonprofit public interest law and policy center based in Washington, D.C., with supporters nationwide. WLF regularly appears in federal and state court proceedings to defend the principles of free enterprise and limited and accountable government. WLF has appeared before this Court on numerous occasions as *amicus curiae* in cases involving statutory interpretation and separation of powers. *See, e.g., FDA v. Brown & Williamson Tobacco Corp.* 120 S. Ct. 1291 (2000); *Gregory v. Ashcroft*, 501 U.S. 452 (1991). WLF also filed comments before EPA opposing the promulgation of the NAAQS at issue in this case.

The Allied Educational Foundation ("AEF") is a non-profit charitable and educational foundation based in New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, including law and public policy. AEF has appeared as *amicus curiae* before this Court in many cases along with WLF.[1]

Amici are interested in both the statutory interpretation issue presented in this cross-petition and the non-delegation issue presented in *Browner v. American Trucking Ass'ns*, No. 99-1257. This brief addresses both questions not only in the interest of judicial economy, but because the issues are closely related and fairly raised in the cross-petition, especially in light of this Court's practice of interpreting statutes to avoid potential constitutional difficulties. *See* Section III, *infra*. *Amici* submit this brief in support of Respondents/Cross-Petitioners ATA, *et al.*, with the consent of all parties. Letters of consent have been filed with the Clerk of the Court.

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amici curiae* and their counsel, made a monetary contribution to the preparation and submission of this brief.

SUMMARY OF ARGUMENT

Nothing in the text of the Clean Air Act suggests that EPA cannot take into account economic impact, feasibility, and the significance of the targeted health risks in setting NAAQS. Nonetheless, the court below accepted EPA's argument that the Act forbids the agency from taking these factors into account, relying on *Lead Industries Ass'n, Inc. v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980).

That decision effectively forces EPA to blind itself to one side of the regulatory equation. If EPA can consider only health factors, without evaluating economic impact, feasibility, or the significance of risks, the only determinate level for any pollutant is that which eliminates all health risks. Short of such a zero-tolerance standard, which understandably, no party advocates, EPA is left adrift. EPA always can justify pushing the acceptable level of pollution closer to zero-tolerance, and the point short of zero-tolerance that EPA chooses is the product of agency whim rather than rational application of a legislated standard.

This interpretation raises serious and unique non-delegation problems. Although this Court repeatedly has rejected claims that Congress failed to provide sufficient guidance in a grant of broad regulatory authority, this case involves a distinct non-delegation problem. Here the difficulty is that the statute, as interpreted by EPA, affirmatively deprives the agency of the necessary regulatory tools to set NAAQS in a rational manner. Unlike the typical complaint that Congress omitted intelligible principles, this case involves an error of commission.

This Court should interpret the Clean Air Act to avoid this potential constitutional difficulty. Nothing in the Act precludes consideration of the limiting principles necessary to allow EPA to set NAAQS according to intelligible principles. The D.C. Circuit's contrary conclusion rests on a misreading of the statute and a failure to heed the common-

sense notion that "no legislation pursues its purposes at all costs." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam). The text of the Act clearly permits EPA to consider costs, feasibility, and significance, and requiring EPA to consider those factors avoids potential non-delegation difficulties.

This Court has long recognized the challenges of discerning the precise limits of the non-delegation doctrine, *see, e.g., Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 46 (1825). Nonetheless, no Justice has doubted the importance of the constitutional principles reflected in the doctrine, and the Court continues to use the doctrine to narrow broad grants of discretionary authority. As Chief Justice Marshall recognized in *Wayman*, "the precise boundary of [the doctrine] is a subject of delicate and difficult inquiry, into which a Court will not enter unnecessarily." *Id.* Interpreting the Act to require EPA to consider economic impact, feasibility, and significance avoids a "delicate and difficult inquiry" into the limits of the non-delegation doctrine.

The problem here inheres in *Lead Industries*, not the Clean Air Act. This Court should reject the former to save the latter from unconstitutional application.

ARGUMENT

I. CONGRESS HAS NOT PRECLUDED EPA FROM CONSIDERING COST, FEASIBILITY, OR THE SIGNIFICANCE OF HEALTH RISKS IN SETTING NAAQS

A. Nothing in the Text or Structure of the Act Prohibits the Use of Limiting Principles

Subsection 109(b)(1), 42 U.S.C. § 7409(b)(1), directs EPA to set NAAQS "the attainment and maintenance of which in the judgment of the Administrator, based on such

criteria and allowing an adequate margin of safety, are requisite to protect the public health." On its face, this provision does not rule out consideration of the cost and feasibility of compliance or the significance of health risks.

The D.C. Circuit's view that "Congress direct[ed] [the] agency to consider only certain factors in reaching an administrative decision," *Lead Industries*, 647 F.2d at 1150, has no support in the statute's text. While the court claimed that "the statute and its legislative history make clear that economic considerations play no part in the promulgation of ambient air quality standards under Section 109," *id.* at 1148, it was at best half right. Nothing in "the statute" remotely compels this counterintuitive conclusion.

Lead Industries' brief discussion of the statute (a prologue to its much more extensive analysis of legislative history) is deeply flawed. The court relied on § 109(b)(1)'s reference to "such criteria" and § 110's standards for EPA review of state implementation plans ("SIPs") to "confirm the view that the Administrator is not required or allowed to consider economic and technological feasibility in setting air quality standards." 647 F.2d at 1149 n.37.

In reality, both of these provisions confirm that Congress did *not* prohibit EPA from considering cost or feasibility or from targeting only significant risks to health. Section 109(b)(1)'s reference to "such criteria" refers back to § 108(a)(2), which requires EPA to issue "air quality criteria" for each pollutant. As even *Lead Industries* recognized, "criteria" as used here is a term of art denoting a document, not a set of factors or a standard for decision. *See* 647 F.2d at 1136-37. What is more, the statute's instruction that "[t]he criteria for an air pollutant, to the extent practicable, shall *include* information on" certain issues, 42 U.S.C. § 7408(a)(2) (emphasis added), is, by its very terms, inclusive rather than exclusive. Accordingly, § 109(b)(1)'s reference to "such criteria" provides no warrant for the exclusion of cost and related considerations.

Section 110 likewise confirms that the Act does not foreclose the consideration of economic impact, feasibility, or significance. Nothing in § 110 expressly authorizes States to consider cost and feasibility in selecting a mix of control devices to meet the NAAQS set by EPA. Yet it is settled that States may do so. *See, e.g., Union Elec. Co. v. EPA*, 427 U.S. 246, 266 (1976). As *Lead Industries* recognized, the statute does make clear that States may consider cost and feasibility "only insofar as this does not interfere with meeting the strict deadlines for attainment of the standards." 647 F.2d at 1149 n.37. *Lead Industries* misconstrued this partial limitation as an explicit authorization for States to consider cost that is missing with respect to EPA. However, this limitation on state authority is just that. States' ability to consider cost and feasibility was an unstated default assumption of the statute, and that same default assumption should apply to EPA, *see* Section IB, *infra*.[2]

Lead Industries' conclusion also is in tension with § 108(b)(1). That provision requires EPA to provide States with "data relating to the cost of installation and operation" of control measures *before* it opens a NAAQS rulemaking. 42 U.S.C. § 7408(b)(1). This requirement enables States to address cost issues in their comments. It would make little sense (and, indeed, would create a moral hazard) to direct EPA to develop and provide this information before beginning a rulemaking, only to require EPA to ignore it during the rulemaking.

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[2] *Lead Industries* also noted that "the Administrator, in reviewing a [SIP], may not consider economic or technological feasibility." *Id.* This fact is equally irrelevant. Congress' decision not to authorize EPA to second-guess States' choices about how to meet EPA's standards reflects basic principles of federalism expressly affirmed in the Act, and has no bearing on whether EPA may consider cost or feasibility in setting those standards. *See* 42 U.S.C. § 7401(a)(3) (finding that air pollution control "is the primary responsibility of States and local governments").

For these reasons, nothing in the text of the Act supports *Lead Industries*' holding. Indeed, *Lead Industries* did not seriously attempt to rest its holding on the statutory text. The court noted that "Section 109(b) does not specify precisely what Congress had in mind when it directed the Administrator to prescribe air quality standards that are 'requisite to protect the public health.'" 647 F.2d at 1152. After *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), this observation would lead a court to conclude that Congress has not "directly spoken to the precise question," *id.* at 842, of whether EPA can consider costs, feasibility, and significance.[3] That recognition, in turn, would compel the conclusion that the statute does not preclude EPA from considering these factors. *See id.* at 843.[4]

Rather than analyze the statutory text in any depth, however, *Lead Industries* jumped directly from its recognition that the "requisite to protect the public health" standard was ambiguous into an extended analysis of

[3] Subsequent D.C. Circuit cases have read *Lead Industries* as equivalent to a *Chevron* step-one case, holding that the "statute on its face does not allow consideration of technological or economic feasibility." *NRDC v. EPA*, 824 F.2d 1146, 1158-59 (D.C. Cir. 1987) (*en banc*) ("*Vinyl Chloride*"). In reality, however, the "statute on its face" is silent on that question, and Congress therefore has not "directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842.

[4] To be sure, *Lead Industries* might have reached the same result by upholding EPA's position under step two of *Chevron*. But that reflects the fact that no party raised a non-delegation claim necessitating the application of principles of constitutional avoidance that would make *Chevron* deference inappropriate. *See* Section III, *infra*. In fact, the author of *Lead Industries* advocated applying the non-delegation doctrine as a constitutional avoidance principle. *See* J. Skelly Wright, *Beyond Discretionary Justice*, 81 Yale L. J. 575, 596 (1972) ("the very breadth" of many statutory delegations "provides an argument for a narrowing judicial construction"). At the very least, § 109(b)(1) certainly does not prohibit the consideration of costs with such clarity that no saving construction is possible. *See* Section III, *infra*.

legislative history. The court devoted four pages to considering the meaning of "adverse health effects," a term that appears nowhere in the statute, and held that the goal of protecting the public from "adverse health effects" doomed the argument that the statute covered only "clearly harmful" health effects. *See id.* at 1152-55. This approach cannot be reconciled with *Chevron*, the proper relationship between statutory text and legislative history,[5] or, as demonstrated in Section III, *infra*, principles of constitutional avoidance.[6]

[5] The court searched the legislative history for a legislative purpose while ignoring the purposes set forth in the statute itself. The Act's "declaration of purpose," which unlike the legislative history was enacted by Congress and approved by the President, demonstrates that Congress' intent was far more balanced. The Act expresses an intent to promote "the productive capacity of [the Nation's] population," a purpose that hardly suggests a mandate to ignore compliance costs. 42 U.S.C. § 7401(b)(1). Moreover, Congress also declared "[a] primary goal" of promoting "reasonable" governmental actions, 42 U.S.C. § 7401(c), which counsels in favor of requiring a reasonable relationship between the costs and benefits of regulations.

[6] In any event, the legislative history of the Act, not surprisingly, does not speak with a single, clear voice on the consideration of economic factors. *See, e.g.*, H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 127 (1977) ("Some have suggested that since the standards are to protect against all known or anticipated effects and since no safe thresholds can be established, the ambient standards should [b]e set at zero or background levels. Obviously, this no-risk philosophy ignores all economic and social consequences and is impractical.") (quoted in *Lead Industries*, 647 F.2d at 1151 n.41). Moreover, the legislative history is silent on the precise question of whether EPA can consider costs, feasibility, and significance in setting NAAQS under § 109(b)(1). Of course, "[i]t is a rare case indeed in which the legislative history alone will permit [a court] to find that Congress has addressed the precise question at issue." *Texas Sav. & Commun. Bankers Ass'n v. Federal Housing Fin. Bd.*, 201 F.3d 551, 555 n.4 (5th Cir. 2000) (quotation omitted).

B. Unless a Statute Precludes It, an Agency Should Be Permitted to Consider Cost, Feasibility, and the Significance of Harms

Lead Industries conflicts not only with the relevant principles of statutory construction, but with common sense as well. *Lead Industries* read congressional silence to preclude EPA from considering cost, feasibility, or significance. However, common sense dictates that, unless expressly forbidden, an agency should be free to take these factors into account. This default rule of construction recognizes that Congress usually, and understandably, does not intend agencies to promulgate regulations that produce little benefit at great cost or that seek to eliminate every risk to health, no matter how improbable or trivial. As this Court has emphasized, "no legislation pursues its purposes at all costs." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam). If, on occasion, Congress intends otherwise, it should make that extraordinary intent unmistakably clear in the statute.

The Act here does not expressly preclude consideration of costs, feasibility, and significance, and the statutory text is consistent with the consideration of these regulatory factors. None of the relevant statutory terms – "health," "protect," "safety," and "adequate" – is absolute. *See, e.g.*, Stephen Breyer, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 76 (1993) ("the meaning of the word 'safety' . . . depends, in part, upon context"). Nor has Congress decreed absolutist mandates. Congress has not, for example, mandated that NAAQS "shall protect the public health at all cost," or protect against "any threat to public health." Likewise, Congress did not define "health" or "safety" as "the absence of any and all bodily effects" or of

"any and all risk."[7] Accordingly, this Court should read § 109(b)(1) to allow for the consideration of compliance costs, feasibility, and the relative significance of health risks.

Courts repeatedly have recognized the common-sense presumption that agencies may consider such factors. In the *Benzene* case, this Court confronted an OSHA Act provision that sought health goals in aspirational language. *See Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 639 (1980) (addressing a standard providing that "no employee will suffer material impairment of health or functional capacity"). The statute explicitly directed the agency to consider feasibility and did not expressly limit regulations to those necessary to prevent "a significant risk of harm." Nonetheless, the Court recognized that Congress must have intended such a limitation. *Id.* at 642. Observing that "'safe' is not the equivalent of 'risk-free,'" *id.*, the plurality rejected OSHA's view that the statute was intended "to eliminate completely and with absolute certainty any risk of serious harm," *id.* at 641, and held instead that "a workplace can hardly be considered 'unsafe' unless it threatens the workers with a significant risk of harm." *Id.* at 642.

Benezene's rule of construction applies with even greater force in this case because EPA views the statute as foreclosing consideration of feasibility, cost, *and* the significance of risks. "In the absence of a clear mandate in the Act, it is unreasonable to assume that Congress intended to give [EPA] the unprecedented power over American industry that would result from the Government's view" that EPA has authority "to impose enormous costs that might produce little, if any, discernible benefit." *Id.* at 645.

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[7] This distinguishes *TVA v. Hill*, 437 U.S. 153 (1978), on which *Lead Industries* relied. In *Hill*, the Court noted that Congress employed absolute language that "admits of no exception." 437 U.S. at 173.

The D.C. Circuit has applied this presumption to a different provision of the Clean Air Act. Rejecting the argument that EPA could not consider cost in determining appropriate remedies to prevent one State's emissions from "contribut[ing] significantly" to nonattainment in a neighboring State, the court reaffirmed the "settled" rule that "[i]t is only where there is 'clear congressional intent to preclude consideration of cost' that we find agencies barred from considering costs." *State of Michigan v. U.S. EPA*, 213 F.3d 663, 678 (D.C. Cir. 2000) (quoting *Vinyl Chloride*, 824 F.2d at 1163, and citing numerous cases). This common-sense presumption also finds expression in President Clinton's Executive Order requiring every agency to "assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs." Exec. Order No. 12,866, § 1(b)(6) (Sept. 30, 1993).

Lead Industries, decided five days before *Benzene*, concluded that EPA could not consider cost, feasibility, or whether substances are "clearly harmful" because Congress had "subordinate[d] such concerns to the achievement of health goals." 647 F.2d at 1149. But this is a false dichotomy. It ignores this Court's caution that "it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." *Rodriguez*, 480 U.S. at 526. There is nothing inconsistent in declaring health protection to be the overriding objective but declining to "pursu[e] [that] purpose[ ] at all costs." *Id.* at 525-26.

Similarly, recognizing the Act's "technology-forcing" character, *see Lead Industries*, 647 F.2d at 1149, does not compel the conclusion that technology must be "forced" even where doing so will "impose enormous costs that might produce little, if any, discernible benefit." *Benzene*, 447 U.S.

at 645 (plurality opinion). This Court's decision in *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29 (1983), makes this point clear. The Motor Vehicle Safety Act identifies "safety to be the preeminent factor," *id.* at 55, and requires "technology-forcing" safety standards, *id.* at 49. Nonetheless, the Court did not perceive any inconsistency in making safety the primary goal but forswearing absolutism and unreason in pursuit of that goal. The Court reiterated that "'safety is the paramount purpose,'" but expressly "'recognize[d] . . . that the Secretary will necessarily consider reasonableness of cost, feasibility and adequate leadtime.'" *Id.* at 55 (quoting S. Rep. No. 1301, 89th Cong., 2d Sess. at 6 (1966)).[8]

[8] Nothing in this Court's decision in *American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490 (1981) ("*Cotton Dust*"), contradicts the presumption that an agency should be *permitted* to consider cost and feasibility unless prohibited by the statute. In *Cotton Dust*, the Court held only that OSHA was not *required* to balance costs and benefits. The Court already had held in *Benzene* that OSHA was limited to regulating significant risks, and the statute itself imposed a feasibility limitation. *See Cotton Dust*, 452 U.S. at 508. With these limiting principles already established, the Court held that cost-benefit analysis was not mandated. *See id.* at 509 ("Thus, cost-benefit analysis by OSHA is not required by the statute because feasibility analysis is."). The majority subsequently noted in *dictum* that the statute lacked any language expressly *requiring* cost-benefit analysis. *See id.* at 510-11 ("Congress uses specific language when intending that an agency engage in cost-benefit analysis."). The Court made clear, however, that Congress need not use any "specific language" to *permit* an agency to engage in cost-benefit analysis. *See id.*

II. THE CLEAN AIR ACT, AS CONSTRUED BY EPA, CANNOT BE SQUARED WITH THE NON-DELEGATION DOCTRINE

A. Despite the Difficulty of Applying It, the Non-Delegation Doctrine Remains an Important Constitutional Principle

The governing test for unconstitutional delegations has remained constant since at least 1928. Congress cannot delegate rulemaking authority to an agency if it fails to "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform." *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928). After twice striking down congressional acts as unconstitutional delegations in 1935, *see A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), the Court has sustained a variety of broad delegations of rulemaking authority as providing the requisite "intelligible principles." As examples, the Court has approved directions to agencies to set prices that are "fair and equitable," *Yakus v. United States*, 321 U.S. 414, 420 (1944), and rates that are "just and reasonable," *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 600-01 (1944), and to grant broadcast licenses in the "public interest," *National Broadcasting Co. v. United States*, 319 U.S. 190, 225 (1943).

In more recent cases, the Court has used the broad standards approved in these earlier cases as a permissive yardstick to measure and approve grants of substantial discretion. In *Mistretta v. United States*, 488 U.S. 361, 374 (1989), for example, the Court observed: "In light of our approval of these broad delegations, we harbor no doubt that Congress' delegation of authority to the Sentencing Commission is sufficiently specific and detailed to meet constitutional requirements." Likewise, in *Touby v. United States*, 500 U.S. 160, 165 (1991), the Court concluded that, "[i]n light of these precedents, one cannot plausibly argue that § 201(h)'s 'imminent hazard to the public safety' standard is not an intelligible principle." Indeed, at least one Justice has expressed doubt that any statute could fail to provide an intelligible principle in light of the Court's approval of the "public interest" standard. *See, e.g., Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting).

Although the test the Court employs to identify unconstitutional delegations provides Congress with considerable latitude, the Court never has doubted the continuing vitality of the important constitutional principles reflected in the non-delegation doctrine. The doctrine reflects the fundamental requirement of our Constitution that all legislative power must be exercised by Congress. *See* U.S. Const., Art. I, § 1. There is no gainsaying the importance of this requirement. As Justice Scalia put the point in the first section of his *Mistretta* dissent (in which he "fully agreed" with the Court's rejection of the challenge to the breadth, as opposed to destination, of the delegation): "It is difficult to imagine a principle more essential to democratic government than that upon which the doctrine of unconstitutional delegation is founded." *Id.* at 415. Accordingly, the deferential nature of the Court's non-delegation test stems not from any skepticism about the importance of the constitutional values reflected in the doctrine, but rather from the difficulty of encapsulating those values in an easily administrable test. "[W]hile the doctrine of unconstitutional delegations is unquestionably a fundamental element of our constitutional system, it is not an element readily enforceable by the courts." *Id.*[9]

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[9] Despite the difficulty of drawing easily administrable lines in this area, many courts continue to enforce non-delegation principles found in State constitutions. *See, e.g., Guillou v. State Div. of Motor Vehicles*, 503 A.2d 838, 841 (N.H. 1986) (unanimously striking down statute as "sufficiently vague and indefinite to amount to an unconstitutional

B. EPA's Construction of the Act Raises a Distinct Non-Delegation Problem From That Typically Considered by This Court

This case involves a non-delegation problem that is distinct from that raised and rejected in numerous cases since 1935. This Court's non-delegation cases all have involved claims that Congress failed to provide the agency with sufficient direction. These cases essentially alleged errors of omission. By authorizing agencies to regulate "in the public interest" or to set "just and reasonable" rates, Congress failed to constrain agency discretion with "intelligible principles," or so the argument has gone.[1] This case is different. The fundamental problem here is not that Congress failed to give EPA any direction in setting NAAQS, although it gave precious little. Rather, the non-delegation defect here is that the statute, at least as interpreted by EPA and the court below, affirmatively precludes EPA from employing tools that are necessary to convert the broad statutory standards into "intelligible principles." In short, this case involves an error of commission.

It is one thing for Congress to grant an agency broad authority to set "fair and equitable" prices or "just and reasonable" rates. This Court repeatedly has approved such grants of authority despite their breadth. *See, e.g., Yakus, supra*; *Hope Natural Gas, supra*. However, part of the reason such broad grants do not deprive agencies of "intelligible principles" is that the context of the statute makes clear that the agency must balance the interests of the concerned parties, and the agency possesses certain obvious tools to balance those interests. For example, in setting prices and rates, agencies necessarily must balance the interests of consumers and suppliers. *See, e.g., Hope*

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delegation of legislative authority"); *see generally* Gary J. Greco, *Standards or Safeguards: A Survey of the Delegation Doctrine in the States*, 8 Admin. L. J. Am. U. 567 (1994).

Natural Gas, 320 U.S. at 603 ("The rate-making process under the Act, *i.e.*, the fixing of 'just and reasonable' rates, involves a balancing of the investor and the consumer interests."). Moreover, the costs of providing the service provide a critical reference point for striking this balance. *See, e.g., Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 397 (1940) (minimum and maximum coal prices fixed by reference to measures of cost); *ICC v. Goodrich Transit Co.*, 224 U.S. 194, 211 (1912) (ICC must have access to carriers' cost and financial information "to successfully perform its duties in respect to reasonable rates"). These same basic trade-offs remain central, and costs retain their importance, whether the agency is tasked with regulating the prices of commodities during wartime or the rates for railroads or natural gas during peacetime.

Accordingly, it would be quite a different matter if Congress were to delegate broad authority to set "fair and equitable" prices or "just and reasonable" rates, but affirmatively specify that the agency could not take into account the costs of supplying the service or the interests of suppliers. By prohibiting reference to costs or the interests of suppliers, the statute would deprive the agency of any meaningful basis for setting a price above zero. The agency always could justify setting the "just and reasonable" rate a little bit lower. The exact point above zero where the agency chose to stop would be the product of agency whim, rather than an intelligible principle laid down by Congress.

Although the grant of authority to set "just and reasonable" rates itself does not fail to provide intelligible principles, the prohibition on the consideration of costs or the interests of suppliers would deprive the standard of any intelligible content. Such a statute would involve an error of commission, not omission. Congress cannot grant an agency such broad authority and simultaneously deny it the ability to use the regulatory tools necessary to give that broad standard meaningful content. In other words, Congress cannot grant

an agency broad authority to regulate and then force the agency to ignore half the regulatory equation.

By the same token, Congress presumably could give EPA broad authority to set NAAQS to avoid adverse health effects from pollutants without violating this Court's non-delegation precedents. The common-sense need to balance benefits and costs to avoid pressing regulation to the point of unreason, *see, e.g.*, Exec. Order No. 12,866, § 1(b)(6) (Sept. 30, 1993), would help to inform an otherwise broad delegation of authority. However, if Congress granted EPA broad authority to set health-protecting standards for non-threshold pollutants, and then affirmatively precluded EPA from considering economic impact, the significance of the health risks, or any factor on the other side of the equation, the resulting statute would raise serious non-delegation problems.

If faced with such a statute, EPA would have no meaningful basis for selecting any NAAQS above a zero-tolerance level (which is zero, for a non-threshold pollutant). If economic impact, technological and economic feasibility, and the interests of industry more generally all were off limits, EPA would have recourse to no limiting principle to identify a stopping point. EPA always could justify setting the permissible level a little lower to achieve a little more health protection. Just as in the rate-setting hypothetical discussed above, with no countervailing consideration to weigh against each marginal increase in health protection, EPA's decision as to which non-zero level to pick would be a product of whim, rather than i..telligible principles.

As interpreted by EPA and the D.C. Circuit since *Lead Industries*, § 109(b)(1) comes perilously close to the unconstitutional statute described above. The D.C. Circuit interprets the Act to preclude EPA from conducting cost-benefit analysis or otherwise considering the costs imposed on industry or the feasibility of compliance. *See* U.S. Pet. App. 14a-15a. Indeed, the D.C. Circuit does not even

recognize a "significance" requirement that at least would limit EPA to protecting against health effects that are "clearly harmful," *see Lead Industries,* 647 F.2d at 1154-55, and EPA specifically opposed a significant-risk limitation akin to that adopted by this Court in *Benzene.*[10] At the same time, it is clear that neither Congress nor EPA has any desire to demand zero tolerance. Such a result would avoid a delegation problem at the expense of outlawing industry. *See* U.S. Pet. App. 15a.

Accordingly, it is clear that Congress intended EPA to set NAAQS that are protective of health while permitting some non-zero level of pollution (and therefore some non-zero risk to health). However, if EPA cannot consider countervailing costs to industry, the feasibility of attaining compliance, and the significance of the health risks, then the statute provides EPA with no intelligible principle to set any particular NAAQS.

For its part, EPA candidly admitted its free reign over the standard-setting process. EPA conceded that it followed "no generalized paradigm" and that its decisions "may not be amenable to quantification in terms of what risk is 'acceptable' or any other metric." 62 Fed. Reg. 38,856, 38,883 (1997).[11] By openly admitting that it was free to

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[10] In the court below, EPA argued that the Act forecloses "a 'test' under which the Administrator must first make a finding that the existing standard permits a 'significant risk of harm' to public health, and then demonstrate that the revised standard is 'needed to improve demonstrably the overall public health.'" *See* EPA Ozone Br. at 42.

[11] EPA also viewed itself as not bound by reliability requirements for scientific evidence, such as those announced in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and its progeny. Some commentators suggest that this failure constitutes an additional ground for rejecting EPA's decisions under the APA. *See* Charles D. Weller & David B. Graham, *New Approaches to Environmental Law and Agency Regulation: The* Daubert *Litigation Approach,* 30 Envtl. L. Rep. 10557, 10569 (2000).

ignore all apparent limiting principles, EPA practically dared the court below to find an unconstitutional delegation.

Importantly, EPA's virtually unfettered discretion stems from the interpretation of the Act to preclude EPA from considering economic impact or employing other tools that would cabin its discretion, not from a failure by Congress to provide sufficient guidance in its original grant of authority. It is a non-delegation error of commission, not omission.

Moreover, this error of commission is not inherent in the statute. As demonstrated in Section I, *supra*, the relevant statutory text neither necessarily nor obviously precludes the consideration of economic impact. To the contrary, the plain text of the statute is compatible with a construction that permits EPA to consider the significance of health risks in relation to the costs of compliance, and a presumption allowing agencies to consider such costs makes sense. *See* Stephen G. Breyer & Richard B. Stewart, ADMINISTRATIVE LAW AND REGULATORY POLICY 350 (3d ed. 1992) ("How can the significance of a risk be determined in isolation from the cost of eliminating the risk?"). In addition, as demonstrated in Section III, *infra*, to the extent there is ambiguity in the statutory text, this Court should require EPA to take costs, feasibility, and the significance of health risks into account. If the statute can be read either to exacerbate or avoid delegation problems, both constitutional values underlying the non-delegation doctrine and general principles of constitutional avoidance require *the courts* (not the agency) to interpret the statute to avoid delegation problems.

III. THE COURT CAN AVOID NON-DELEGATION DIFFICULTIES BY INTERPRETING THE ACT TO REQUIRE CONSIDERATION OF COSTS, FEASIBILITY, AND SIGNIFICANCE

This Court should apply *Ashwander* principles of constitutional avoidance, *see Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring), to interpret the Clean Air Act to avoid the delegation problems created by EPA's construction. In particular, the Court should use *Ashwander* and the constitutional values underlying the non-delegation doctrine to fashion a clear statement rule. Unless Congress makes its intent unmistakably clear, a court should not interpret a grant of regulatory authority to preclude the agency from considering one half of the relevant regulatory equation. In the context of environmental regulation, courts should require Congress to speak with unmistakable clarity if it intends to preclude the consideration of economic impact. Likewise, in the context of rate or price regulation, an intent to preclude the consideration of supply costs would need to be unmistakable.

These clear statement rules would serve both general interests in constitutional avoidance and the specific values underlying the non-delegation doctrine. Importantly, courts should apply these *Ashwander* and clear statement principles before moving to the second step of the *Chevron* analysis. The contrary approach of the court below, which would vest the primary responsibility for avoiding unconstitutional delegations in the agency, conflicts with the underlying purpose of the non-delegation doctrine.

A. The Non-Delegation Doctrine Is Well-Suited For Use as a Tool to Avoid Constitutionally Suspect Interpretations of Statutes

As noted in Section II, *supra*, the non-delegation doctrine remains an important constitutional principle, despite the Court's difficulty in formulating a workable test for identifying unconstitutional delegations. No Justice has expressed any doubts about the constitutional basis for the doctrine or suggested that the Court should ignore delegation concerns. To the contrary, the Court has taken delegation issues seriously. The paucity of cases finding unconstitutional delegations stems not from skepticism over the non-delegation doctrine's *bona fides*, but from the difficulty of encapsulating the doctrine in a test that is "readily enforceable by the courts." *Mistretta*, 488 U.S. at 415 (Scalia, J., dissenting).

This Court has long recognized that the line between permissible delegations of discretion and unconstitutional delegations of legislative authority "has not been exactly drawn." *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825). Chief Justice Marshall, writing for the Court in *Wayman*, noted that "there is some difficulty in discerning the exact limits within which the legislature may avail itself of the agency of" others in fulfilling legislative commands. *Id.* at 46. Although "the maker of the law may commit something to the discretion of the other departments, . . . the precise boundary of this power is a subject of delicate and difficult inquiry, into which a Court will not enter unnecessarily." *Id.*

However, the "difficulty in discerning the exact limits" and "precise boundary" of permissible delegation does not mean that the Court needs to abandon the non-delegation doctrine as an interpretive principle. The Court recognized as much in *Mistretta*. While emphasizing that it repeatedly had upheld "Congress' ability to delegate power under broad

standards," the Court noted that it had employed the non-delegation doctrine in "the interpretation of statutory texts, and, more particularly, to giv[e] narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional." 488 U.S. at 373 & n.7.

Indeed, the difficulty in fashioning a clear test to identify unconstitutional delegations and the sensitive separation of powers concerns implicated by the non-delegation doctrine make it particularly well-suited to application as an aid in statutory construction. Striking down a statute as an unconstitutional delegation requires the courts to declare an act beyond the power of Congress. Courts, which are generally reluctant to take this extreme step, are all the more hesitant when equipped only with a test that has proven difficult to apply. As Chief Justice Marshall summarized, the non-delegation doctrine "is a subject of delicate and difficult inquiry, into which a court will not enter unnecessarily." *Wayman*, 10 Wheat. at 46. The use of *Ashwander* and clear statement principles makes sense in the non-delegation context precisely because they allow the courts to avoid engaging in a "delicate and difficult inquiry . . . unnecessarily."

This Court adopted a clear statement principle to avoid a similarly "delicate and difficult inquiry" in *Gregory v. Ashcroft*, 501 U.S. 452 (1991). In *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985), the Court concluded that the Tenth Amendment does not lend itself to judicial enforcement both because the text does not suggest any clear rules and because the political branches are well-placed to address concerns over federal and state relations. In *Ashcroft*, this Court recognized that it was "constrained in [its] ability to consider the limits that the state-federal balance places on Congress' powers under the Commerce Clause." 501 U.S. at 546 (citing *Garcia*). Nonetheless, despite the established limits on its ability to play a primary role in enforcing the Tenth Amendment, the Court staked out

an important complementary role in promoting the underlying values of the Tenth Amendment by adopting a clear statement rule.

The clear statement rule served two purposes. Not only did it help "avoid a potential constitutional problem," but it ensured that Congress would be put on notice when considering legislation that implicated state prerogatives.[12] *Id.*; *see also United States v. Bass*, 404 U.S. 336, 349 (1971) ("In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of a clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision."). A clear statement rule could play the same twin roles in the non-delegation context. Such a rule would avoid potential constitutional difficulties and ensure that Congress thoroughly considers substantial delegations of discretion and the implications of precluding agencies from using tools that would help cabin that discretion.[13]

In addition, application of *Ashwander* and clear statement principles advances the underlying values of the

[12] Generally, *Ashwander* principles are triggered when one interpretation of a statute raises "serious doubt" about its constitutionality. *See, e.g.*, *International Ass'n of Machinists v. Street*, 367 U.S. 740, 749 (1961). However, in the context of constitutional provisions that do not readily lend themselves to judicial enforcement, like the Tenth Amendment or the non-delegation doctrine, the trigger for the application of *Ashwander* must be the conviction that serious constitutional issues are implicated, not "serious doubt" about the ultimate constitutional question. *Ashcroft* makes this point clear. Even though the Court recognized that *Garcia* virtually foreclosed a successful Tenth Amendment challenge, the Court applied the clear statement rule to "avoid a potential constitutional problem." *See* 501 U.S. at 464.

[13] Indeed, a clear statement rule for delegations is easier to justify than the rule adopted in *Ashcroft*. *Garcia* rejected the governing Tenth Amendment test as "unsound in principle and unworkable in practice." 469 U.S. at 546. In contrast, the Court never has questioned the soundness of the non-delegation doctrine.

non-delegation doctrine. The fundamental purpose of the doctrine is to promote legislative accountability by ensuring that the people's elected representatives in Congress alone exercise the legislative power. A clear statement rule for questionable delegations likewise promotes legislative accountability. It ensures that Congress actually considers whether to grant discretion to administrative agencies, with the result that any discretion granted to agencies will reflect Congress' conscious exercise of its legislative authority.

Indeed, so clear is the link between *Ashwander* and the non-delegation doctrine that some commentators have suggested that the application of *Ashwander* to agency interpretations of statutes in general reflects the values of the non-delegation doctrine. *See, e.g.*, Cass Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 331-32 (2000); Cass Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 Mich. L. Rev. 303, 358 (1999). In other words, courts are reluctant to allow agencies to interpret statutes to apply extraterritorially or to implicate rights across the constitutional spectrum precisely because Congress should not be presumed to delegate such delicate legislative issues unless its intent is unmistakably clear. This Court made a similar point in *Greene v. McElroy*, 360 U.S. 474, 507 (1959): "Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them."

In sum, application of the non-delegation doctrine as an *Ashwander* or clear statement principle avoids the difficulties raised by direct enforcement of the doctrine while at the same time ensuring that the important constitutional values underlying the doctrine are not discarded. Even if the non-delegation doctrine does not lend itself to a "readily enforceable" test for striking down acts of Congress, courts

face little institutional difficulty in identifying the construction of a statute that avoids delegation problems.

B. This Court Consistently Has Applied Non-Delegation Principles as an Aid to Statutory Construction

One clear example of this Court's use of the non-delegation doctrine as an *Ashwander* principle is *National Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336 (1974) ("*NCTA*"). The statute at issue there authorized the FCC to set fees that were "fair and equitable taking into consideration direct and indirect cost to the government, value to the recipient, public policy or interest served, and other pertinent facts." *See id.* at 337. The Court expressed concern that allowing the FCC to set fees that reflected its view of "public policy" would risk permitting an unconstitutional delegation of Congress' taxing authority. *See id.* at 342-44. To avoid this possibility, the Court interpreted the statute to allow fees to be set only with reference to the "value to the recipient." *See id.* at 344. The Court expressly invoked the non-delegation doctrine to narrow the statute: "Whether the present Act meets the requirement of *Schechter* and *Hampton* is a question we do not reach. But the hurdles revealed in those decisions lead us to read the Act narrowly to avoid constitutional problems." *Id.* at 342.

The Court likewise invoked the non-delegation doctrine in *Kent v. Dulles*, 357 U.S. 116 (1958), to preclude the Secretary of State from denying passports to certain individuals despite Congress' grant of broad authority to "grant and issue passports . . . under such rules as the President shall designate and prescribe." *See id.* at 129. The decision is particularly noteworthy because the Court invoked non-delegation principles in the foreign affairs

context, where executive discretion reaches its zenith. *See, e.g., Clinton v. City of New York*, 524 U.S. 417, 445 (1998).

Similarly, a plurality of this Court in *Benzene* employed the non-delegation doctrine to find a statutory requirement that health risks be significant. Even though the statute imposed an express "feasibility" constraint, the plurality observed that unless OSHA also was limited to targeting risks that were "significant," "the statute would make such a 'sweeping delegation of legislative power' that it might be unconstitutional under the Court's reasoning in" *Schechter* and *Panama Refining*. *See* 448 U.S. at 646. The plurality recognized that "[a] construction of the statute that avoids this kind of open-ended grant should certainly be favored." *Id.*

Although these cases predate *Chevron*, the application of constitutional avoidance principles to narrow potentially excessive grants of discretion is a task for the courts, not the agency. In other words, courts must apply the non-delegation doctrine as an aid to statutory construction before moving to the more deferential step two of the *Chevron* analysis. As a general matter, this Court has made clear that courts should apply *Ashwander* principles before moving to step two. For example, in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568 (1988), the Court rejected the NLRB's interpretation of a statute to preclude peaceful handbilling in a shopping mall. The Court made clear that the NLRB's construction "would normally be entitled to deference" under *Chevron*. *Id.* at 574. Nonetheless, the Court rejected the interpretation because it "pose[d] serious questions of the validity of [the statute] under the First Amendment." *Id.* at 575; *see also NLRB v. The Catholic Bishop of Chicago*, 440 U.S. 490 (1979) (applying constitutional avoidance principles to invalidate the NLRB's interpretation of a statute pre-*Chevron*).

Obviously, neither *Ashwander* nor *Chevron* has any application when a statute is completely unambiguous and subject to only a single construction. *Cf. Miller v. French*, 120 S. Ct. 2246, ____, Slip Op. at 5-6 (June 19, 2000). However, when a statute is subject to more than one construction, *Ashwander* favors the construction that avoids constitutional difficulties while *Chevron* favors the construction adopted by the agency. When the agency fails to adopt the construction of an ambiguous statute that avoids constitutional difficulties, one of the two principles must yield. *DeBartolo* makes clear that *Ashwander* trumps *Chevron*. 485 U.S. at 577 ("Even if this construction of the Act were thought to be a permissible one, we are quite sure that in light of the traditional rule followed in *Catholic Bishop*, we must independently inquire whether there is another interpretation, not raising these serious constitutional concerns, that may fairly be ascribed to [the statute]."). *Accord Chamber of Commerce v. Federal Election Comm'n*, 69 F.3d 600, 605 (D.C. Cir. 1995); *Bell Atlantic Tel. Co. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994); *cf. Ashcroft*, *supra* (applying clear statement rule despite dissent's suggestion that the Court should defer to the agency's interpretation under *Chevron*).

The need to employ constitutional avoidance principles before deferring to agency constructions of statutes applies with special force in the non-delegation context. Excessive agency discretion is the very evil against which the non-delegation doctrine guards. To defer to an agency construction of an ambiguous statute that would expand agency discretion to the point of raising constitutional doubts would turn the non-delegation doctrine on its head.

Although the court below correctly recognized that EPA's construction of the statute raised non-delegation problems, it erred by remanding for the agency to identify a narrowing construction of the statute. The court reached this result by mistakenly concluding that the constitutional

avoidance "approach of the *Benzene* case . . . has given way to the approach of *Chevron*." *See* U.S. Pet. App. 76a. This observation simply ignores the teaching of *DeBartolo* that *Ashwander* principles trump *Chevron* deference. Equally important, the methodology of the court below would frustrate the underlying purpose of the non-delegation doctrine by giving agencies additional discretion to interpret grants of legislative authority that already are troublingly broad. *See, e.g., id.* at 94a-95a (Silberman, J., dissenting from denial of rehearing *en banc*) ("It hardly serves – indeed, it contravenes – that purpose to demand that EPA in effect draft a different, narrower version of the Clean Air Act."). This Court recognized as much in rejecting the agencies' broad constructions of their delegated authority in *NCTA*, *Kent*, and *Benzene*. Nothing in *Chevron* alters the wisdom of that approach.

C. The Non-Delegation Problems Raised by EPA's Suggested Interpretation of the Clean Air Act Doom That Construction of the Act

EPA's construction of § 109(b)(1) clearly implicates non-delegation principles. As explained in Section II, *supra*, EPA's construction deems Congress affirmatively to have deprived EPA of the necessary means to set NAAQS pursuant to intelligible principles. By forbidding EPA from considering feasibility and costs and dismissing certain health risks as insignificant, the Act, as interpreted by EPA, defies rational application.

However, the Act need not be construed to deny EPA the necessary tools for its rational application. Nothing in the statutory text prohibits the consideration of economic impact, feasibility, and the significance of health risks. Even if the decision to employ such tools otherwise might be left to agency discretion, *Ashwander* trumps *Chevron* and requires rejecting an interpretation that unnecessarily raises

constitutional issues. Accordingly, the Court should interpret the Act to require EPA to consider these limiting principles in setting NAAQS.

It certainly does no violence to the Act to interpret it to require the consideration of the costs and feasibility of compliance and the significance of risks. Indeed, such an interpretation is far more faithful to the statutory text than the saving constructions previously adopted by this Court to avoid potential delegation problems. For example, in *NCTA*, the Court read a provision authorizing fees that were "fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts," *see* 415 U.S. at 337, to permit fees that were "fair and equitable taking into consideration" the "value to the recipient" and nothing else. *See id.* at 342-44. The Court's saving construction necessitated reading sixteen words out of the statute.

In *Kent*, the Court's saving construction required reading words into, rather than out of the statute. Although Congress gave the Secretary of State the unqualified power to "grant and issue passports . . . under such rules as the President shall designate and prescribe," *see* 357 U.S. at 123, the Court wrote in a qualification that denied the Secretary authority to withhold passports based on citizens' political activities. *See id.* at 129.

In contrast to these permissible saving constructions, requiring EPA to consider compliance costs, feasibility, and the significance of health risks fully comports with the text of the Clean Air Act. It does not require reading any words into or out of the statute. It simply requires reading the Act in light of customary, background principles of regulatory analysis.

Indeed, in the context of the particular non-delegation problem raised by EPA's construction – a non-delegation error of commission – this Court should employ a clear statement requirement. Before finding that Congress

arguably has created a non-delegation problem by restricting the agency from employing the regulatory tools necessary to interpret the statute pursuant to intelligible principles, courts should demand that Congress make that intent unmistakably clear. Economic impact, the significance of risks, and the costs and feasibility of providing regulated services are basic building blocks of rational regulation. Courts should not lightly assume that Congress has taken these tools off the table.

This clear statement rule makes sense both as a predictive matter and as an application of principles of constitutional avoidance. It makes little sense to assume that Congress would direct an agency to ignore half of the key regulatory equation, and doing so risks creating serious non-delegation problems. In a case like this, where Congress has not come close to expressing a clear intent to foreclose the consideration of economic impact, feasibility, and the significance of risks, courts should reject such counter-intuitive and constitutionally problematic interpretations.

Whether this Court applies general principles of constitutional avoidance or the clear statement principles suggested above, it should reject EPA's construction of the Clean Air Act. EPA's refusal to consider compliance costs, feasibility, and the significance of health risks unnecessarily deprives the agency of the intelligible principles necessary for rational application of the statute. EPA's construction risks unconstitutional results that simply do not inhere in § 109(b)(1) as written. This Court should reject EPA's position and construe the Act to require EPA to consider economic impact, feasibility, and the significance of risks.

CONCLUSION

For the foregoing reasons, the Court should reject EPA's construction of the Clean Air Act and remand the case to EPA with directions to reformulate the NAAQS in light of intelligible principles.

Respectfully submitted.

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